

APPENDIX A**UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION**

Before Commissioners: Joseph C. Swidler, Chairman;
Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross,
and Harold C. Woodward.

AMERADA PETROLEUM CORPORATION, *et al.*

Docket Nos. CI62-1544; *et al.*

**Order Denying Motion to Impose Price Conditions in
Temporary Certificates**

(Issued February 5, 1963)

On November 29, 1962, the Long Island Lighting Company, Philadelphia Electric Company and The United Gas Improvement Company (Movants) filed a motion requesting that the Commission vacate the temporary certificates issued to the various party-applicants to the above-entitled proceeding or, in the alternative, impose a condition in each of these temporaries, requiring that the applicant refund to the purchaser, with interest at 7% per annum, any amounts hereafter collected which may be determined to be in excess of the price required by the public convenience and necessity under each applicant's respective certificate docket.

Each of the producers herein except Sun Oil Company in Docket No. CI62-276 have been granted temporary authority to make sales in interstate commerce. In almost every instance the authority was granted without condition as to refund to a price below that at which the sale would be initiated. The initial price would, however, continue to be collected until a prospective price could be determined after hearing upon the applications. Sales of gas were commenced by each of the producers pursuant to and in reliance upon the temporary authority.

Essentially the motion constitutes an application for rehearing of the Commission's Letter Orders issuing temporary authorizations to certain of the producers herein. Section 19(a) of the Natural Gas Act provides that an application for rehearing must be submitted within 30 days following the issuance of an order. The motion herein was not submitted within the statutory 30-day period following the issuance of the temporary authorizations. There is no question that such temporary authorizations constitute appealable orders and, therefore rehearing should be sought within 30 days. However, we recognize that the letter orders issuing the authorizations were unreported, although copies thereof were available to the public. We shall not, therefore, dismiss the motion as being untimely. However, for the reasons hereinafter set forth, we must deny the motion to terminate the existing temporary authorizations.

Section 7(c) of the Natural Gas Act empowers the Commission to issue temporary certificates when emergency situations exist. We have promulgated regulations recognizing certain situations which constitute emergency situations as to independent producers. See regulations under the Natural Gas Act, Section 157.28.¹ Each of the producers who requested the issuance of temporary authorization to sell gas set forth an emergency situation which, under our regulations, permitted the issuance of such authority. Temporary certificates were therefore issued. Movants would now have us withdraw the existing authority and proffer to each producer a new temporary certificate conditioned to meet the requested requirements, giving each producer the opportunity to reject such temporary authority. Movants ignore the fact that the pro-

¹ Also see order denying applications of New York Commission for rehearing and reconsideration and motion for a stay issued December 31, 1962, in *J. Ray McDermott, et al.*, Docket Nos. CI63-301, *et al.*

ducers and pipelines here involved have already acted upon the temporary authorizations as issued and have undoubtedly expended considerable funds in justifiable reliance thereon. Apparently Movants have also ignored the dependence of pipelines and their customers upon continued service once a reservoir of natural gas begins flowing into interstate lines. To now offer the producers an opportunity to reject a substituted temporary certificate, conditioned to provide for refunds down to the price to be fixed after the Section 7 hearing we have ordered, would clearly be contrary to the public interest. It would jeopardize the pipeline's existing gas supply from these sources, and place them in a position where, even if they could replace the gas with other supply, their investment in facilities here would be lost and new expenditures required without concomitant benefit to the public. It would also leave the producers, all of whom received temporary authorizations only upon a showing of emergency conditions, with no assurance that they could secure new outlets for their gas.

Petitioner's proposal in other words comes down to little more than an argument that we should unilaterally impose a new refund commitment upon the producers. This we will not do. Assuming, without deciding, that we have authority to impose such additional restriction where extraordinary conditions exist that would justify such action, we think this clearly would not be a proper action for us to take here. Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with "such certainty as to allow the exercise of choice upon [the producers'] part." *Sunray Mid-Conti-*

ment Oil Company v. F.P.C., 270 F. 2d 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy.

While this case relates to the imposition of refund conditions in temporary authorizations already issued, we do not wish our determination here to be construed as indicating that we will normally impose such a condition if the applications for temporary authority were before us for the first time. On the contrary, as we made clear in our order in *J. Ray McDermott, supra*, in granting temporary authorizations at our area ceiling prices for producers to sell gas, pending the conclusion of the statutory hearing on the permanent certificate, we have balanced the competing interests of producers and consumers (as well as given full consideration to the needs for certainty of the natural gas companies and the public generally) by providing that while the temporarily certificated price is not subject to refund, the price during this interim period cannot exceed our ceiling price and the producers may not file for any higher price authorized by their contract pending issuance of the permanent certificate. Our policy in this respect was clearly set forth in the Fourth Amendment to our Statement of General Policy No. 61-1 in which we reduced the Southern Louisiana ceiling and observed that the Commission's interim ceilings represent the Commission's judgment of a ceiling which "will enable the Commission to hold the line on new sales in the area at a level consistent with the public interest and, at the same time, to enable producers to obtain authorizations which provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas."

In view of these circumstances we find it would be contrary to the public interest, as well as inequitable, to condition the temporary certificates issued to the above-mentioned producers as requested by Movants.

The Commission orders:

The request made by the Long Island Lighting Company, Philadelphia Electric Company and the United Gas Improvement Company either to have the temporary certificates issued to the party applicants to the above-styled proceedings vacated or, in the alternative for the imposition of a condition in each of these temporaries be and hereby is denied.

By the Commission. Commissioners Morgan and Ross concurring, filed separate statements appended hereto.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

AMERADA PETROLEUM CORPORATION, *et al.*

Docket Nos. CI62-1544, *et al.*

(Issued February 5, 1963)

MORGAN, Commissioner, *concurring:*

I concur only in the result.

Unfortunately, past indiscretions committed by this Commission in the matter of granting temporary certificates do not permit us now, in good grace, summarily to grant relief sought by the consuming public.

I therefore limit myself to the hope that proceedings on the merits of this matter will soon be concluded; and that the rates in question will be adjusted, where necessary, to correspond to the "lowest possible reasonable rate" required by the Act.¹

¹ *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378 at 388 (1959).

I do not concur with the reasoning of the majority statement. It appears to be based on what the majority hopes it would find if a hearing were held on the subject motion. Specifically, we should not allow an institutional guilt complex regarding the improprieties that have attended past issuance and use of Section 7 temporary certificates to warp our present understanding of the true legal character of that device.²

The concurring statement of Commissioner Ross fully reflects my views in this matter.

HOWARD MORGAN

Howard Morgan, *Commissioner*

AMERADA PETROLEUM CORPORATION, *et al.*

Docket Nos. CI62-1544, *et al.*

(Issued February 5, 1963)

Ross, Commissioner *concurring*:

I concur with the action of my colleagues in denying the instant motion. This separate statement is necessitated by the failure of the majority to take this occasion to remind industry of the true nature and legal character of temporaries in view of the abuses which have occurred in this area.

Since the earliest days of producer regulation, temporary authorizations permitting the interstate sale of gas have been granted in emergency situations in which expeditious action was required. This practice rapidly expanded to situations where the "emergency" was not particularly acute. Once granted by the Commission and accepted by

² See our previous understanding on this point as set forth at mimeo. page 19 of Opinion No. 351, issued January 22, 1962.

the producer, the terms of the temporaries were rarely—if ever modified. Temporary authorization quickly became the mode of producer regulation under Section 7 of the Natural Gas Act, and this situation persists today.¹

Producers began to view the temporary authorizations as the final word regarding the terms under which their sales would be made, and the Commission took no direct action which could be construed as being inconsistent with this belief. The oppositions to the instant motion, for example, mirror the producers' attitude that a temporary authorization, once accepted, represents virtually an unchallengeable and immutable right to sell gas under the terms of the temporary.

In view of this history, I do not consider it desirable to amend the authorizations here in question. However, I can find no justification for reinforcing the fictitious claim that a temporary somehow acquires an aspect of permanence—a notion which is legally unsound, and one which involves the possibility that excessive prices will receive continued sanction resulting in unjust enrichment to the producers.

Temporary authorizations are supposedly granted in emergency situations in order to avoid the delay involved in a detailed inquiry. They are granted summarily, without notice of hearing. As such, they represent a concession to producers to the possible detriment of their purchasers. While an application for rehearing may be filed (the producers even would have us reject this), this hardly measures up to our traditional concept of justice, which assumes that interested parties will have a right to state

¹ In my partial dissent in *Tenneco Oil Co.*, Docket Nos. CI63-334, *et al.* I noted that of 2880 temporary certificates granted in the last two years, only 31 had been superseded by permanent certificates.

their positions before—not after—decision is made.² It is crystal clear to me, as it was to this Commission twelve months ago, that temporary authorizations are subject to change on the same basis as that on which they are granted. In the remanded CATCO case, this Commission held:

“Under Section 7(c) the Commission may issue a temporary certificate in case of emergency pending the determination of an application for certificate. This appears to contemplate a continuous course of adjustment until the time that a final order determines that conditions under which a permanent certificate shall be issued.”

(*Continental Oil Company, et al.*, Docket Nos. G-11024, *et al.*, Opinion No. 351, p. 19)

I can find no justification for joining the majority in its purported retreat on this point. Rather than retreat, the instant motion presents an excellent opportunity for us to emphasize the essentially transient nature of temporaries, consistent with our holding in *CATCO, supra*.

The necessity for firmly adopting such a policy is manifest. Only five months ago, we found the in-line price in Texas Railroad District No. 4 to be 15¢, at least as of September 28, 1960.³ It is difficult to conceive that the in-line price with respect to the contracts here involved has escalated since that time to 18¢, an increase of 20 per cent. Yet the majority closes its eyes to this significant determination, and not only denies the relief requested, but

² An essential element of due process is an opportunity to be heard before the reaching of a judgment. Judgment without an opportunity to be heard is judicial oppression. *WJR, The Goodwill Station, Inc. v. F.C.C.*, 174 F. 2d 226, 233 (1948) citing the principal found in *Dartmouth College v. Woodward* 4 Wheat. 518, 581 (Webster's argument) (1819), and in *Gaplin v. Page* 18 Wall. 350, 368 (1873).

³ *Skelly Oil Co.*, Docket Nos. G-18638, *et al.*, Opinion No. 362.

goes further and voices its determination to perpetuate the conditions under which excessively high prices will be charges again and again without providing for recoupment down to the proper level. Fearing that its action might be misconstrued, the majority, in what is clearly dicta on page 3, indicates that it will not normally impose refund conditions in initial temporary authorizations at the ceiling price levels.

In my opinion, there is no rational basis for such a position. For one thing, it is obvious that all of the reasons cited in the majority's order for refusing to impose the requested refund conditions are clearly inapplicable to situations in which we would be considering an initial application for temporary authorization. The majority's apparent rationale for this position is found in its statement that it balances the competing interests of industry and the consumer by limiting temporary authorizations to prices established in the Statement of General Policy, and by providing for no rate increases during the term of temporary authorization. However, the prospect of limiting producer prices to the applicable ceiling is small consolation to the consumer when he is convinced—and with justification—that several of the ceilings are unjustifiably high.

In summary, I am compelled to voice my disagreement with the majority's apparent insistence to regulate producer prices, in the important interim period pending the establishment of just and reasonable rates, by means of temporary authorizations, and on as summary a basis as possible. In my opinion, initial prices of producers should be governed by permanent certificates. To the extent that temporaries are granted, they should be subject to change on an *ex parte* basis, particularly when it is evident that the price is either too high or too low.

CHARLES R. ROSS

Charles R. Ross, Commissioner

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION.

(18 CFR 2.63)

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Docket No. R-316

REFUND CONDITIONS IN TEMPORARY CERTIFICATES OF PUBLIC
CONVENIENCE AND NECESSITY ISSUED TO INDEPENDENT
PRODUCERS OF NATURAL GAS

Order No. 336

Statement of General Policy

(Issued February 9, 1967)

By decision issued January 23, 1964, the United States Court of Appeals for the District of Columbia Circuit held that the Commission had power, in the issuance of permanent certificates to independent producers of natural gas, to require refunds of all or a portion of excess amounts collected under temporary certificates granted without express refund conditions. *Public Service Comm. v. FPC*, 329 F. 2d 242, *cert. denied sub nom. Prado Oil Co. v. FPC*, 377 U.S. 963 (1964).

. By a decision issued December 9, 1966, the United States Court of Appeals for the Tenth Circuit held that refunds could not be ordered under temporary certificates lacking express refund conditions, thereby creating an apparent conflict with the decision of the District of Columbia Circuit. *Sunray-DX Oil Company v. FPC*, Nos. 7781 *et al.*, ... F. 2d

In view of this situation and for the purpose of protecting consumers from "out-of-line" rates, the Commission

has determined as a matter of policy to include an express refund condition in temporary certificates hereafter issued to independent producers of natural gas authorizing sales in areas where just and reasonable rates have not been determined. This policy will be maintained until the apparent conflict between the decisions of the Courts of Appeal is resolved.

The Commission finds:

(1) The statement issued herein concerns a matter of general policy which does not require notice or hearing under section 4(a) of the Administrative Procedure Act.

(2) It is appropriate and in the public interest in administering section 7 of the Natural Gas Act to set forth the Commission policy with respect to the matter here under consideration.

The Commission, acting under the authority of the Natural Gas Act, as amended, particularly sections 7(c), 7(e) and 16 thereof (52 Stat. 825, 830; 56 Stat. 83; 15 U.S.C. 717f(c), 717(e), 717o), orders:

(A) Effective upon the issuance of this order, Part 2, General Policy and Interpretations, Chapter I, Title 18 of the code of Federal Regulations is amended by adding a new § 2.63 to read as follows:

§ 2.63 *Express refund conditions in certain temporary certificates of public convenience and necessity issued to independent producers of natural gas.*

For the purpose of protecting consumers from the exaction of out-of-line rates, temporary certificates authorizing sales of natural gas by independent producers in areas where just and reasonable rates have not been determined will contain an express refund condition fixed at a level two cents below the applicable guideline rate set forth in the statement of General Policy No. 61-1, as amended

(§ 2.56 of this part), or the previously determined applicable in-line rate, whichever is lower, together with a proportional adjustment for Btu's of less than 1000 per cubic foot, measured on a wet basis.

(Secs. 7, 16, 52 Stat. 825, 830; 56 Stat. 83; 15 U.S.C. 717f(c), 717f(e), 717o)

(B) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.